

# The Right to Water in the Case-Law of the Inter-American Court of Human Rights

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*Abstract:* The human right to water is nowadays more broadly recognised, mainly due to the essential societal function that this resource plays; likewise, because of the present water scarcity is generating conflicts between its different uses. Thus, this right aims at protecting human beings by guaranteeing access to clean water that is essential to satisfy vital human needs. Similarly, access to clean water is an important element to guarantee other rights including the right to life and health.

The recognition of the right to water is mainly achieved in two ways: as a new and independent right and as a subordinate or derivative right. Concerning the latter, the right to water can emanate from civil and political rights, such as the right to life; or can be derived from economic, social and cultural rights, including the right to health, the right to an adequate standard of living, and the right to housing.

This contribution explores the position of the Inter-American Court of Human Rights regarding the right to water, and analyses whether the Court has recognised the right to water and, if so, in which manner.

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*Key words:* Human right to water, Inter-American Court of Human Rights, indigenous peoples, case-law.

## El Derecho al agua en los casos de la Corte Interamericana de Derechos Humanos

*Resumen:* El derecho humano al agua cada día encuentra una mayor aceptación y reconocimiento, tanto a nivel nacional como internacional. Este reconocimiento se debe principalmente a la primordial función social que desempeña este recurso, así como a los crecientes conflictos que su escasez genera. Con este derecho se busca proteger al ser humano, al garantizarle, por lo menos, acceso a una cantidad mínima de agua limpia, necesaria para satisfacer las necesidades humanas vitales. Del mismo modo, el acceso al agua potable es un elemento importante para garantizar otros derechos, incluidos el derecho a la vida y a la salud.

El reconocimiento del derecho al agua se ha logrado principalmente de dos maneras: una, como un derecho nuevo e independiente y la otra como un derecho subordinado o derivado. En cuanto a esta última forma, se entiende que hay una serie de derechos humanos de los cuales el derecho al agua puede derivar, tales como el derecho a la vida, clasificado dentro de los derechos civiles y políticos, o el derecho a la salud, el derecho a un nivel de vida adecuado, el derecho a la vivienda, entendidos estos como derechos económicos, sociales y culturales.

Este escrito examina la posición de la Corte Interamericana de Derechos Humanos respecto al derecho humano al agua. Con este objetivo la jurisprudencia de la Corte ha sido estudiada para determinar si esta ha reconocido en su jurisprudencia este derecho, y, si es el caso, en qué forma lo ha hecho.

*Palabras claves:* Derecho humano al agua, Corte Interamericana de Derechos Humanos, comunidades indígenas, jurisprudencia.

## O Direito à água na jurisdição da Corte Interamericana de Direitos Humanos

*Resumo:* O direito humano à água cada dia encontra uma maior aceitação e reconhecimento, tanto no nível nacional quanto internacional. Este reconhecimento deve-se principalmente à primordial função social que desempenha este recurso, assim como aos crescentes conflitos que sua escassez gera. Com

este direito busca-se proteger ao ser humano, ao lhe garantir, pelo menos, acesso a uma quantidade mínima de água limpa, necessária para satisfazer as necessidades humanas vitais. De igual forma, o acesso à água potável é um elemento importante para garantir outros direitos, incluídos o direito à vida e à saúde.

O reconhecimento do direito à água tem se logrado principalmente de duas formas: uma, como um direito novo e independente e a outra como um direito subordinado ou derivado. Em relação a esta última forma, se entende que existem uma série de direitos humanos dos quais o direito à água pode derivar, tais como o direito à vida, classificado dentro dos direitos civis e políticos, o direito à saúde, o direito em um nível de vida adequado, o direito à moradia, entendidos estes como direitos econômicos, sociais e culturais.

Este escrito examina a posição da Corte Interamericana de Direitos Humanos respeito ao direito humano à água. Com este objetivo a jurisprudência da Corte tem sido estudada para determinar se esta tem reconhecido em sua jurisprudência este direito, e, se é o caso, de que maneira o tem feito.

*Palavras-chaves:* Direito humano à água, Corte Interamericana de Direitos Humanos, comunidades indígenas, jurisprudência.

## Introduction

It is surprising that although water is an essential element for life and well-being, access to this resource was not recognised as a human right when most fundamental rights were adopted under the International Bill of Human Rights. It is believed that the reason for this was the belief that there would always be enough water available for everyone. However, in recent decades it became clear that this is not true due to the mismanagement and pollution of the resource, which reduces the usable water for human purposes and other activities, thus creating water scarcity.

Although all life depends on water, only ten percent of the freshwater in the world is employed for domestic use, about 20 percent for industry and about 70 percent for irrigation.<sup>1</sup>

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1 World Water Assessment Programme, “Statistics Water Use”, UN-WATER [http://www.unwater.org/statistics\\_use.html](http://www.unwater.org/statistics_use.html), accessed on 13 April 2013.

As a result, there has been an increase in the awareness about the necessity to recognise access to safe water as a human right. This, in order to give priority to its use, so every human being can have access to the resources to at least satisfy his/her basic human needs, including water for drinking purposes, cooking, personal hygiene, household cleaning, and sanitation.

Although dealing with the causes that generate water scarcity around the world —such as pollution and overexploitation— is relevant for stopping the decline of available water for human consumption, as well as other societal activities (industry, transport, food production), this article only focuses on examining the position of the Inter-American Court of Human Rights, concerning the recognition of the emerging human right to water.

The methodology carried out in this article can be classified as a doctrinal and comparative legal research, since the analysis of case law is the primarily objective of the research and a comparison between the jurisprudence of regional courts of human rights is done when relevant.

The first part of this paper depicts the main reasons for recognising access to water as a human right; and explains the two ways in which the right to water has been recognised: as a subordinate or as an independent right. The second part analyses the case law of the Inter-American Court of Human Rights in order to see whether this judicial body recognises the right to water, before drawing some conclusions.

## Recognition of the Right to Water

Water is an essential element for life. Each person must have an intake, through drinking and eating of a few litres of fluids per day as a physiological requirement.<sup>2</sup> Every human being needs to drink a minimum amount of water to prevent death from dehydration. Likewise, the quality of water is important. Thus, water must be clean to avoid water-related diseases. Water is also necessary for other basic needs such as sanitation, personal and house cleaning, and food production, among others.

According to the World Health Organization (WHO) about 884 million people still do not have access to improved<sup>3</sup> sources of drinking-water,

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2 Bruins, H. J., “Proactive Contingency Planning vis-a-vis Declining Water Security in the 21<sup>st</sup> Century”, *Journal of Contingencies and Crisis Management*, 2000, 8 (2), p. 64.

3 Access to improved water source refers to household connection, public standpipe, borehole, protected well or spring, and rainwater collection. Unimproved sources include vendors, tanker trucks, unprotected wells and springs, as well as surface water (river, dam, lake, pond,

2.6 billion people lack access to improved sanitation<sup>4</sup> and there are about 2 million annual deaths attributable to unsafe water and sanitation.<sup>5</sup>

Despite the fact that water is an essential and limited natural resource, as well as a public good fundamental for life and health, none of the general international human rights treaties explicitly provide for the right to water. Its recognition started to develop only in recent decades through a number of governmental statements, declarations, and resolutions<sup>6</sup>. Furthermore, only the most recently adopted treaties on human rights have explicitly incorporated the obligation to take appropriate measures to ensure access to clean water. This is the case of the Convention on the Elimination of All forms of Discrimination against Women (CEDAW),<sup>7</sup> the Convention on the Rights of the Child (CRC),<sup>8</sup> and the Convention on the Rights of Persons with Disabilities<sup>9</sup>. Likewise, recently in some constitutions and national legislation the right to water has started to be acknowledged, such as in the constitutions of South Africa, Mexico, Bolivia, and Ecuador.

Access to water is nowadays discussed from a human rights perspective since it has always been fundamental to human survival. At the present

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stream, canal, irrigation channels), World Health Organization and UNICEF. “Drinking Water: Equity, safety and sustainability”, UNICEF and World Health Organization, at [http://www.wssinfo.org/fileadmin/user\\_upload/resources/report\\_wash\\_low](http://www.wssinfo.org/fileadmin/user_upload/resources/report_wash_low), 2011, p. 11, accessed on 5 October 2012. See also The World Bank, Data, Improved water source (% of population with access), <http://data.worldbank.org/indicator/SH.H2O.SAFE.ZS>, accessed on 30 September 2012.

4 World Health Organization and UNICEF, “Progress on Sanitation and Drinking-Water: 201 update”, World Health Organization and UNICEF, at [http://whqlibdoc.who.int/publications/2010/9789241563956\\_eng\\_full\\_text.pdf](http://whqlibdoc.who.int/publications/2010/9789241563956_eng_full_text.pdf), 2010, pp. 6-7, accessed on 27 October 2012.

5 World Health Organization. Water Sanitation and Health (WSH), Facts and Figures on Water Quality and Health, at [http://www.who.int/water\\_sanitation\\_health/facts\\_figures/en/index.html](http://www.who.int/water_sanitation_health/facts_figures/en/index.html), accessed on 27 September 2011.

6 See Mar del Plata Action Plan and Resolution II on ‘Community Water Supply adopted at the UN water Conference held in Mar del Plata in 1977, Chapter 18 of Agenda 21 adopted at the UN Conference on Environment and Development in 1992; Resolution “The Future We Want” adopted at the UN-Conference on Sustainable Development in 2012; and UN-General Assembly Resolution 64/292 on the human right to water and sanitation (UN-Doc A/Res/64/292), <http://www.un.org/en/ga/64/resolutions.shtml>, accessed on 14 October 2012.

7 UN-Convention on the Elimination of All Forms of Discrimination against Women, Article 14, para. 2 (adopted on 18 December 1979 and entered into force on 3 September 1981).

8 UN-Convention on the Rights of the Child, Article 24, para. 2 (adopted on 20 November 1989 and entered into force in September 1990).

9 UN-Convention on the Rights of Persons with Disabilities, Article 28 (2) (adopted on 13 December 2006 and entered into force on 3 May 2008).

time, water is increasingly perceived as a scarce source and the negative effects on human health caused by water pollution are more evident.<sup>10</sup> Thus, there is a more clear awareness about the lack of available water.

The crystallization of the human right to water give individuals a legal basis to claim access to water to satisfy at least the most basic human needs and to enjoy a decent life. It transforms the basic need for water into a rightful claim and gives rise to corresponding obligations on the state.<sup>11</sup> Nevertheless, there is still some debate, regarding its normative content and the obligations that derive from it. Consequently, some states are reluctant to recognise this right.

With the purpose of clarifying the contents and the obligations that derive from the human right to water, the Committee on Economic, Social and Cultural Rights (hereinafter the CESCR) issued General Comment 15. Therein the right to water is understood as a right that “entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses. An adequate amount of safe water is necessary to prevent death from dehydration, to reduce the risk of water-related disease and to provide for consumption, cooking, personal and domestic hygienic requirements”.<sup>12</sup>

The CESCR also explains that this right contains both freedoms and entitlements. The former include the right to maintain access to existing water supplies necessary for the right to water, and the right to be free from interference, for instance to be free from arbitrary disconnection or contamination of water supplies. On the other hand, the entitlements include the right to a system of water supply and management that provides equality of opportunity for people to enjoy the right to water.<sup>13</sup> Water must be sufficient for personal and domestic uses, physically and economically accessible to all and in good quality.<sup>14</sup>

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10 Winkler, I. T., *The Human Right to Water: Significance, Legal Status and Implications for Water Allocation*, Hart Publishing, Oxford, 2012, p. 9.

11 Ibid., p. 8.

12 Committee on Economic, Social and Cultural Rights, General Comment 15 (2002), the right to water (Art. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights). UN-Doc E/C.12/2002/11, para 2. All General Comments are available online at <http://www2.ohchr.org/english/bodies/cescr/comments.htm>

13 CESCR, General Comment 15 (2002), the right to water, UN-Doc E/C.12/2002/11, para. 10.

14 Ibid., para. 12.

Moreover, the CESCR in its General Comment 15 describes states parties' obligations regarding the human right to water, which are divided in the tripartite typology of obligations to protect, respect and fulfil. It also determines the core obligations of this right, which are to be realised immediately, and it points out the implementation measures to be taken at the national level, such as legislation, strategies and policies, remedies and accountability.

### **The Right to Water as a Stand-Alone Right or as a Derivate Right?**

Since the right to water is not explicitly recognised under the International Bill of Human Rights, its recognition has been achieved in two ways: 1) as subordinate and necessary to achieve the primary human rights already recognised, whether as a civil and political right, economic and social rights, or as a collective right; or 2) as an independent and new human right.

As a subordinate right, the human right to water is considered to derive from other right(s). For instance, the CESCR has mentioned that the right to water emanates from the right to an adequate standard of living enshrined in Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>15</sup>

The CESCR states that ICESCR Article 11 specifies a list of rights that are emanating from, and indispensable for, the realization of the right to an adequate standard of living. The Committee expresses "The right to water clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions for survival".<sup>16</sup> The CESCR also recognises that the right to water is inextricable related to the right to the highest attainable standard of health (Art. 12), the right to adequate housing and adequate food (Art. 11), and should be seen in conjunction with other human rights, particularly the right to life and human dignity.<sup>17</sup>

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15 CESCR, General Comment 6 (1995), The economic, social and cultural rights of older persons, para. 32, CESCR, General Comment 15 (2002), The right to water, UN-Doc E/C.12/2002/11, para. 3.

16 CESCR, General Comment 15 (2002), The right to water, UN-Doc E/C.12/2002/11, para. 3.

17 CESCR, General Comment 15 (2002) the right to water, UN-Doc E/C.12/2002/11, para. 3.

Likewise, it has been argued whether the right to water is embedded in the right to life, incorporated in Article 6 of the International Covenant on Civil and Politics Rights (ICCPR). Then again, it is alleged for instance that the provisions of the ICCPR are set more in the context of the security of the person and the deprivation of liberty rather than in the context of conditions to sustain human life.<sup>18</sup>

This discussion on the kind of human rights from which the right to water should derive will continue until a general international agreement is established that recognises that this is an independent, stand-alone right. Therefore, the determination of right(s) from which the human right to water emanates will continue to be decided by national and regional courts on human rights when interpreting and applying human rights law.

On the other hand, the right to water has been explicitly recognised as an independent, stand-alone right in different constitutions around the world, including the constitutions of South Africa,<sup>19</sup> Ethiopia,<sup>20</sup> Kenya,<sup>21</sup> Mexico,<sup>22</sup> Uruguay,<sup>23</sup> Bolivia,<sup>24</sup> and Ecuador,<sup>25</sup> among others, and this recognition may continue to increase. The explicit recognition of this right at the national level, in the Constitution or the legislation, allows individuals to claim directly access to water when this right has been violated or threatened; thus preventing that individuals need to wait until other human rights, from which the right to water derives, are at risk, in order to be in the position to claim the protection of those rights, and, therefore, to obtain access to this vital resources.

As a result, from jurisdiction to jurisdiction, it depends on whether the right to water is considered a stand-alone or a derivate right.

For the purpose of analysing whether the Inter-American Court of Human Rights recognises or not the human right to water, the case law of this judicial body will be examined.

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18 Brown Weis, E., "The evolution of international water Law", in *331 Recueil Des Course: Collected Courses of the Hague Academy of International Law*, Martinus Nijhoff Publishers, Leiden, 2009, p. 328. McCaffrey, S. C., "A human right to water: domestic and international implications", *The Georgetown International Environmental Law Review*, 1992, 5 (1), p. 9.

19 Constitution of the Republic of South Africa, Act No 108 of 1996. Section 27.

20 Constitution of the Federal Democratic Republic of Ethiopia. Article 90.1

21 Constitution of Kenya, Article 42.1.

22 Constitution of Mexico, Article 4, para. 6.

23 Constitution of Uruguay, Article 47.

24 Constitution of Bolivia, Article 16.

25 Constitution of Ecuador, Article 2.



## Case Law of the Inter-American Court of Human Rights

Before analysing the case law of the Inter-American Court of Human Rights (hereinafter IACTHR), it is worth mentioning that the right to water has not been explicitly incorporated in any of the treaties or declarations that form part of the Inter-American Human Rights System. This is not surprising, since this human right started to emerge with a greater strength only in the last decades. A similar situation is found in the European system, since the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter the European Convention) does not make any explicit reference to access to water. Concerning the African system, it is also known that the main instrument for the promotion and protection of human rights in this regional system,<sup>26</sup> the African Charter on Human and Peoples' Rights (hereinafter the African Charter) does not explicitly contain any reference to the right to water. Nevertheless, other treaties, like the African Charter on the Rights and Welfare of the Child<sup>27</sup> and the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa,<sup>28</sup> request states parties to take measures to ensure access to safe drinking water. Hence, taking the first steps towards the explicit recognition of this right. However, these conventions, and therefore the rights embedded therein, are restricted to two groups of people, children and women, and cannot be applied outside that scope.

Since the human right to water is not enshrined in any of the treaties of the Inter-American system, this paper analyses whether the IACTHR has recognised the human right to water as a right that derive from other rights already acknowledged in the treaties of this regional system. After looking at the different judicial decisions taken by the IACTHR it was found that in

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26 Murray, R., *Human Rights in Africa, From the OAU to the African Union*, Cambridge University Press, Cambridge, 2004, p. 49.

27 African Charter on the Rights and Welfare of the Child, Article 14, Health and Health Services. (2): "States Parties to the present Charter shall undertake the full implementation of this right and in particular take measures: [...] c) to ensure the provision of adequate nutrition and safe drinking water", <<http://www.africa-union.org/child/home.htm>>.

28 Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, Article 15: "States Parties shall ensure that women have the right to nutritious and adequate food. In this regards, they shall take appropriate measures to: a) provide women with access to clean drinking water, sources of domestic fuel, land and the means of producing nutritious food", <[http://www.achpr.org/english/\\_info/women\\_en.html](http://www.achpr.org/english/_info/women_en.html)>.

the last years the Court has referred to the importance of having access to drinking water to satisfy certain human rights.

Although there are only a few decisions referring to access to drinking water, they are remarkably important and can be categorised in two main groups. The first one is related to the conditions given in detention or in prison. The second is related to a specific group of people under special vulnerable conditions. Following, the respective judicial decisions are going to be analysed according to this classification.

## 1. Access to Water during Detention or Imprisonment

The Inter-American Court of Human Rights has declared that states are under the obligation to provide individuals with all the basic conditions to enjoy a dignified life when they are under their custody. The following two cases depict the position of the Court regarding the human right to water for individuals that are in detention or in prison.

In the first case, *López Álvarez v. Honduras*, one of the earliest cases where the IACtHR started to mention the importance of having access to water, it was proven that Mr. López was imprisoned for six year and four months in the criminal centres of Tela and Támara, in Honduras, in overcrowded and unhealthy prison conditions.<sup>29</sup> During detention, Mr. López was living in a reduced cell inhabited by numerous inmates, he had to sleep on the floor for a long time period, and he did not receive an adequate diet or drinking water, nor did he have essential hygiene conditions.<sup>30</sup>

The Court analysed the situation in which Mr. López was detained and indicated that the “State is the guarantor of the rights of the detainees, and it must offer them life conditions compatible with their dignity”.<sup>31</sup> In this judgement, the IACtHR recalls case-law of the European Court of Human Rights where the latter Court indicates that, based on Article 3 (prohibition of torture) of the European Convention, the state must ensure that a person is detained in conditions compatible with the respect to his human dignity. Additionally, that the manner and methods used to exercise the measure do not submit them to any anguish that exceed the inevitable level of suffering intrinsic to the detention, and that, given the practical demands of the

29 IACtHR, *López Álvarez v. Honduras*, Judgment of February 1, 2006, para. 54(51).

30 Ibid., para. 108.

31 Ibid., para. 106.

imprisonment, his health and well-being are adequately insured, offering him, among other things, the medical assistance required.<sup>32</sup>

Due to the bad conditions in which Mr. López was detained, the Court concluded that Mr. López was not treated with due respect for his human dignity and that the state did not comply with the duties that correspond to it in its position of guarantor of the rights of the detainees. In this case, lack of access to drinking water for the detainee was one of the elements that the Court considered to conclude that there was a violation of the right to human treatment, enshrined in Articles 5 (1), (2) and (4) of the American Convention.

In the second case under study, *Vélez Llor v Panama*, the IACtHR unequivocally expresses that access to drinking water is a minimum condition that a state needs to guarantee when an individual is deprived of his/her liberty.

Based on the facts of this case Mr. Vélez Llor, and Ecuadorian national, was arrested and detained in the Republic of Panamá for crimes related to his immigration status. It was proven and acknowledged by Panamá that there were serious deficiencies in the national prison system and that in the prisons where Mr. Veléz Llor was placed the following problems existed: structural deficiencies in the detention centres, problems in the provision of water supply, overcrowding, and deficiency in the classification of prisoners, among others.<sup>33</sup>

In this judgment, the IACtHR indicates that in terms of Article 5(1) and (2) of the American Convention,<sup>34</sup> every person deprived of his/her liberty has the right to live during detention in conditions compatible with his/her personal dignity. Since the state is the responsible for detention institutions, it is in a special position to guarantee the rights of any person under its custody. In addition, the Court affirms that states cannot invoke economic hardship to justify dreadful imprisonment conditions that do

32 European Court of Human Rights, Case *Kudla v Poland*, Judgement of 26 October 2000, No. 30210/96, para. 94 in *IACtHR; López Álvarez vs Honduras, Judgment of February 1, 2006, para. 106*.

33 IACtHR, *Vélez Llor v Panama*, Judgment of November 23, 2010, para. 197.

34 Article 5 of the American Convention states that: “1) Every person has the right to have his physical, mental, and moral integrity respected. 2) No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person”.

not comply with the minimum international standards and do not respect human dignity.<sup>35</sup>

In this case, Panamá acknowledged the violation of the right to human treatment, enshrined in Article 5 of the American Convention, only concerning certain detention conditions under which Mr. Vélez was held, but it denied the violation of this right concerning the conditions related to adequate medical care and water supply. As a result, the Court analysed the two particular prison conditions in controversy.

Regarding the provision of water, it was proven that there was a frequent problem with the drinking water supply in the penitentiary that affected the prisoners; also, there had been a shortage of water fifteen days before that caused dehydration, diarrhoea, and conjunctivitis for prisoners, as well as the overflowing of wastewater in the prison installations.

With reference to this situation, the IACtHR clearly notes that the lack of drinking water is a particular important aspect of the prison conditions. The Court recalls international standards, such as the UN Standard Minimum Rules for the Treatment of Prisoners that require drinking water available for every prisoner whenever needed, and General Comment 15 of the CESCR, which calls states to take steps to ensure that prisoners and detainees are provided with sufficient, safe water for their daily individual requirements. According to the IACtHR, states are under the obligation to take steps to ensure that prisoners have sufficient safe water for daily personal needs, such as water for drinking purposes, whenever they require it, as well as for personal hygiene.<sup>36</sup>

The Court recognises that states must provide sufficient amounts of water to prisoners to satisfy their personal and hygiene needs; however, it remains silent when it comes to the point to establish what should be understood as sufficient. The IACtHR does not indicate, at any point, a minimum amount of drinking water that should be guaranteed to individuals deprived of their liberty; so they can satisfy their basic daily needs.

Regarding prison conditions, the Court considers that

[...] the absence of minimum conditions that ensure the supply of drinking water within a penitentiary center, constitutes a serious failure of the state's duty to guarantee the rights of those held under state's custody,

35 IACtHR, *Vélez Loor v Panama*, Judgment of November 23, 2010, para. 198.

36 Ibid., para. 215.

given that, due to the particular circumstances of any deprivation of liberty, detainees cannot satisfy their personal basic needs by themselves, though said needs are essential for the basic development of a dignified life, such as access to sufficient safe water”.<sup>37</sup>

Therefore, states are under the obligation to provide individuals with all the basic conditions to enjoy a dignified life.

Concerning medical care, the judgment mentioned that Mr. Vélez did not receive timely, adequate and complete medical care to an apparent old skull fracture, which was not properly treated.

The IACtHR concludes that the detention conditions in which Mr Vélez was held, as a whole, constitute a cruel, inhumane and degrading treatment contrary to the human being and, therefore, it constitutes a violation of Article 5 (1) and (2) of the American Convention.<sup>38</sup>

It is clear from these two cases that according to the IACtHR the right to water for prisoners or detainees can emanate from the right to human treatment, enshrined in Article 5 of the American Convention.

When comparing the previous judgement of the IACtHR with the case law of the European Court of Human Rights and the African Commission, it was found that the latter bodies also considered the deprivation of access to drinking water to detainees or prisoners a cruel, inhuman or degrading treatment.

The European Court of Human Rights (ECtHR) has declared that denied access to drinking water, even though there is no indication of a positive intention to humiliate the detainees, is not a condition compatible with the respect of their human dignity; therefore, breaching Article 3 on the prohibition to inhumane treatment of the European Convention.<sup>39</sup> Besides, the Committee for the Prevention of Torture and Inhumane or Degrading Treatment or Punishment (hereinafter CPT) —which assists the ECtHR in the implementation of Article 3 of the European Convention—<sup>40</sup> has stated that, during police custody, of relatively short duration, the detention

37 Ibid., para. 216.

38 Ibid., para. 227.

39 European Court of Human Rights, *Iacov Stanciu v Romania* Judgment of 24 July 2012, App. No 35972/05, para. 179.

40 “The CPT is not an investigative body, but provides a non-judicial preventive mechanism to protect persons deprived of their liberty against torture and other forms of ill-treatment. It thus complements the judicial work of the European Court of Human Rights”, Council

condition in police cells must meet certain basic requirements, including access to proper toilet facility under decent conditions, adequate means to wash themselves, as well as access to drinking water.<sup>41</sup> Concerning prisons, the CPT states that prisoners should have adequate access to shower or bathing facilities; and that running water, available within cellular accommodation, is also desirable.<sup>42</sup> These basic requirements are clear tools to realise the human right to water.

The African Commission has also considered, in a particular judgement, that the detention conditions in which some detainees were held violate Article 5<sup>43</sup> (prohibition to inhumane treatment) of the African Charter on Human and Peoples' Rights,<sup>44</sup> since these conditions included lack of access to water for personal hygiene: the bathroom facilities of one detention centre consisted solely of two buckets of water for over 500 detainees.

In this way, the three regional systems are taking into account the General Comment 15 of the CESCR that indicates that special attention should be given to individuals who have faced difficulties in exercising the human right to water, including prisoners and detainees.<sup>45</sup> Consequently, all three regional systems of human rights consider the lack of access to water for prisoners or detainees a cruel, inhuman or degrading treatment and, therefore, a violation of human rights.

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of Europe, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, in <http://www.cpt.coe.int/en/about.htm>, accessed 14 April 2013.

41 European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, '12<sup>th</sup> General Report' [CPT/Inf (2002) 15], para. 47, in <<http://www.cpt.coe.int/en/annual/rep-12.htm>>. See also European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 'CPT Standards' [PCT/Inf/E (2002) 1-Rev -2011] 13, <http://www.cpt.coe.int/en/documents/eng-standards.pdf>, accessed 10 February 2013.

42 European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment, '2<sup>nd</sup> General Report' [CPT/Inf (92) 3], para 49, <http://www.cpt.coe.int/en/annual/rep-02.htm>, accessed 10 February 2013.

43 African Charter, Article 5: "Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited".

44 African Commission, *Institute for Human Rights and Development in Africa v Angola*, 7-22 May 2008, Communication 292/04, para. 51-52.

45 CESCR, General Comment 15 (2002), The right to water, UN-Doc E/C.12/2002/11, para. 16.

## 2. Access to Water for Indigenous People Displaced from their Ancestral Lands

The IACtHR has also found considered that, when indigenous people are under a special vulnerable condition, particularly under a real and immediate risk to life, states are under the obligation to provide them with basic services such as access to safe water, food, health services and education in order to guarantee their right to a dignified life.<sup>46</sup>

It will be now examined what the IACtHR considers to be special vulnerable conditions, so as to place the state under the obligation to provide (for free) basic services and goods, including drinking water.

The cases that are analysed herein concern three different indigenous communities (Yakye Axa, Sawhoyamaya and Xakmok Kasek) claiming the ownership and possession of their ancestral lands, which is now privately owned, in order for them to move back into the said lands and continue with their traditional subsisting activities. These three cases were brought against the state of Paraguay.

The land ownership problem for these and other communities started at the end of the 19<sup>th</sup> century, when vast pieces of land in the Paraguayan Chaco were acquired by British businessmen, through the London Stock Exchange, as a consequence of a debt owed by Paraguay. The division and sale of such territories were made while their inhabitants, exclusively Indians, were kept ignorant of the facts.<sup>47</sup> The new owners of those lands brought different market economy activities, implicating restricted mobility of the indigenous communities, as well as considerable changes in their subsistence activities, a situation that has worsen in recent decades.

As a result, the indigenous communities Yakye Axa, Sawhoyamaya and Xakmok Kasek, in the years 1993, 1991, and 1990, respectively, took the necessary steps to start legal claims at the national level for the lands they consider their traditional habitat. A few years later, members of the communities Yakye Axa and Sawhoyamaya, decided to return to the lands claimed as part of their ancestral territories, while waiting for a ruling on their cases. However, they were not allowed to enter said land, for this reason

46 IACtHR, "Annual Report of the Inter-American Court of Human Rights 2010", Organization of American States and Inter-American Court of Human Rights, in [http://www.corteidh.or.cr/docs/informes/2010\\_eng.pdf](http://www.corteidh.or.cr/docs/informes/2010_eng.pdf), San Jose, Costa Rica, 2011, p. 65.

47 IACtHR, *Indigenous Community Sawhoyamaya v Paraguay*, Judgment of March 29, 2006, para. 73(1).



they decided to settle alongside public roads bordering what they claim their ancestral land.

In those settlements, members of the Yakye Axa and Sawhoyamaxa communities live in very poor conditions. They cannot cultivate or practice their traditional subsistence activities (wild animals hunting, fishing, and fruit gathering, among others) and they do not have minimum basic services. The members of these communities do not have access to clean water, their most reliable source is collected rainwater. The water they regularly use comes from deposits located in the lands they claim; however, it is used both for human consumption and for personal hygiene, and it is not protected from contamination through animal contact.<sup>48</sup> Likewise, the Xakmok Kasek indigenous community, although located in a piece of land close to the one they claim, is also living in precarious conditions since they are also deprived of access to their traditional means of subsistence. Moreover, this community is located in a forest area with no access to water.<sup>49</sup> As a result of those extreme conditions and of lack of access to their traditional medicine or medical care, some members of these communities are sick and others have died in precarious conditions.

After exhausting the respective procedure before the Inter-American Commission, the latter brought the case to the IACtHR. In the ruling of these cases, the Court had to analyse whether the right to life, enshrined in the American Convention, has been violated by Paraguay. When doing so, the Court declares in its ruling that, due to the basic nature of this right, approaches that restrict the right to life are not admissible. Essentially, this right includes not only the right of every human being not to be arbitrarily deprived of his life, but also the right that conditions that impede or obstruct access to a decent existence should not be generated.<sup>50</sup> In other words, states have the duty to guarantee conditions that may be necessary in order to prevent violations of the right to life.<sup>51</sup>

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48 IACtHR, *Indigenous Community Yakye Axa v Paraguay*, Judgment of June 17, 2005, para. 50.95. See also IACtHR, *Indigenous Community Sawhoyamaxa v Paraguay*, Judgment of March 29, 2006, para 73(69).

49 IACtHR, *Indigenous Community Sawhoyamaxa v Paraguay*, Judgment of March 29, 2006, para. 155. IACtHR, *Indigenous Community Xakmok Kasek v Paraguay*, Judgment of August 24, 2010, para. 195.

50 IACtHR, *Indigenous Community Yakye Axa v Paraguay*, Judgment of June 17, 2005, para. 161.

51 IACtHR, *Indigenous Community Sawhoyamaxa v Paraguay*, Judgment of March 29, 2006, para. 151.



The IACtHR also explains that states must comply with certain obligations under the right to life, it says:

One of the obligations that the state must inescapably undertake as guarantor, to protect and ensure the right to life, is that of generating minimum living conditions that are compatible with the dignity of the human person and not creating conditions that hinder or impede it. In this regard, the state has the duty to take positive, concrete measures towards the fulfilment of the right to a decent life, especially in the case of persons who are vulnerable and at risk, whose care becomes a high priority.<sup>52</sup>

The IACtHR notes in these three cases that the right to life implies not only the negative obligation that no person shall be deprived of his/her life, but also, positive obligations to secure the full and free enjoyment of human rights; therefore, states shall adopt all appropriate measures to protect and preserve the right to life.<sup>53</sup>

Concerning the settlement of the members of the Yakye Axa community, the Court expressed that they do not have access to appropriate housing with the minimum basic services, such as clean water and toilets.<sup>54</sup> The IACtHR notes that:

Special detriment to the right to health, and closely tied to this, detriment to the right to food and access to clean water, have a major impact on the right to a decent existence and basic conditions to exercise other human rights, such as the right to education or the right to cultural identity. In the case of indigenous peoples, access to their ancestral lands and to the use and enjoyment of the natural resources found on them is closely linked to obtaining food and access to clean water.<sup>55</sup>

52 IACtHR, *Indigenous Community Yakye Axa v Paraguay*, Judgment of June 17, 2005, para. 162.

53 IACtHR, *Indigenous Community Yakye Axa v Paraguay*, Judgment of June 17, 2005, para. 162. IACtHR, *Indigenous Community Sawhoyamaxa v Paraguay*, Judgment of March 29, 2006, para. 152. IACtHR, *Indigenous Community Xákmok Kásek v Paraguay*, Judgment of August 24, 2010, para. 187.

54 IACtHR, *Indigenous Community Yakye Axa v Paraguay*, Judgment of June 17, 2005, para. 164.

55 *Ibid.*, para. 167.

The IACHR also deems that the state failing to guarantee the right to communal property has a negative effect on the community members' right to a decent life, because it has deprived them of the possibility to access their traditional means of subsistence, as well as to the use and enjoyment of the natural resources necessary to obtain clean water. Furthermore, the Court considers that the state has not taken the necessary positive measures to ensure that the members of these communities, in the time in which they have been with no territory, were and are able to live in conditions compatible with their dignity.<sup>56</sup>

As a result, the Court also found a violation of Article 21 of the American Convention that guarantees the right to use and enjoy the own property.<sup>57</sup> The Court established as well, for all cases, that Paraguay violated Article 4 (right to life) of the American Convention for failing to take measures, such as the provision of sufficient goods (water and food) and health services, regarding the vulnerable conditions that affected the possibility of these indigenous communities of having a decent life.<sup>58</sup>

In the case *Xakmon Kasek Vs Paraguay*, the most recent one, the IACHR in its ruling examined the possible violation of the right to life in more detail. The Court analysed the alleged violation of the right to life in two parts: a) the international responsibility of the state for the alleged deaths, and b) the right to a decent existence.

With the purpose of assessing the measures taken by the state of Paraguay for complying with its obligation to guarantee the right to life, the IACHR subdivided the right to a decent existence in four elements: 1) access to and quality of water; 2) access to food; 3) health; and 4) education. These four elements are some of the most important that constitute a decent life.

Regarding access to and quality of water, the IACHR observes that the water supplied by Paraguay was not sufficient since the quantity provided amounted to not more than 2.17 litres per person per day, which is less than

56 IACHR, *Indigenous Community Yakje Axa v Paraguay*, Judgment of June 17, 2005, para. 168.

57 IACHR, *Indigenous Community Yakje Axa v Paraguay*, Judgment of June 17, 2005, para. 156. IACHR, *Indigenous Community Sanhoyamaxa v Paraguay*, Judgment of March 29, 2006, para. 144. IACHR, *Indigenous Community Xákmok Kásek v Paraguay*, Judgment of August 24, 2010, para. 182.

58 IACHR, *Indigenous Community Yakje Axa v Paraguay*, Judgment of June 17, 2005, para. 176. IACHR, *Indigenous Community Sanhoyamaxa v Paraguay*, Judgment of March 29, 2006, para. 173. IACHR, *Indigenous Community Xákmok Kásek v Paraguay*, Judgment of August 24, 2010, para. 196, 200 and 208.

what, according to the international standards, is required to meet all the basic needs including food and hygiene.<sup>59</sup>

In fact, the Court points out that, according to international standards, most people need minimum 7.5 litres per day to meet all basic needs, including food and hygiene. The Court refers to different documents to support its statement, such as General Comment 15 on the right to water adopted by the CESCR; a research titled “Basic water requirements for human activities: meeting basic needs” made by Gleick, as well as a study published by the World Health Organization regarding domestic water quantity, written by Howard and Bartram. The IACHR in its ruling cites the executive summary of the study published by the WHO, which briefly states that

[b]ased on estimates of requirements of lactating women who engage in moderate physical activity in above-average temperatures, a minimum of 7.5 litres per capita per day will meet the requirement of most people under most conditions. This volume does not account for health and well-being-related demands outside normal domestic use such as water use in health care facilities, food production, economic activity or amenity use.<sup>60</sup>

However, the previous amount of water mentioned by the Court is not even close to satisfy daily basic human needs. I consider that the IACHR misunderstood the mentioned study, by exclusively focusing in the executive summary of it. The mistake that the Court made regarding the interpretation of the cited paragraph is understandable, since the executive summary does not clearly specify that the minimum of 7.5 litres will meet the requirements of most people under most conditions only regarding consumption, and excluding other uses such as hygiene.

When reading the entire study published by the WHO, it is explicitly explained that the figure of 7.5 litres per capita per day *only* amounts for drinking and cooking. The authors of this document clearly explain that the basic minimum water figure of total consumption (i.e. drinking water plus water for foodstuffs preparation) can only be calculated by adding the

59 IACHR, *Indigenous Community Xákmok Kásek v Paraguay*, Judgment of August 24, 2010, para. 195.

60 Howard, G. and Bartram, J., “Domestic Water Quantity, Service Level and Health”. *World Health Organization*, (WHO/SDE/WSH/03.02), in [http://www.who.int/water\\_sanitation\\_health/diseases/wsh0302/en/index.html](http://www.who.int/water_sanitation_health/diseases/wsh0302/en/index.html), 2003, Executive Summary

volume required for food preparation (approximately 2 litres per capita per day) to the volumes of water required for drinking; i.e. 7.5 litres per capita per day, taking into account the specific needs of lactating women.<sup>61</sup>

In fact, lactating women are the population group that require the largest amount of water for drinking, even more than children or adults, whether in average conditions or in manual labour in high temperatures. This is the reason why lactating women are taken as a parameter. Hence, the volume of 7.5 litres of water is not enough to satisfy hygienic needs. To put it even clearer, the study immediately explains that the need for domestic water supplies for basic health protection exceeds the minimum required for consumption (drinking and cooking). Additional volumes are required for maintaining food and personal hygiene through hand and food washing, bathing and laundry. Further on, the study also mentions that having intermediate and optimal access to water, which means volumes between 50 to 100 litres and 100 to 300 litres per capita per day (lpcd) respectively, generate low and very low levels of health concern. While having intermediate access to water (50 to 100 lpcd) allows that most basic hygienic and consumption needs are met; having optimal access to water (100 to 300 lpcd) guarantees that all basic uses can be met.<sup>62</sup>

The IACtHR in its judgment also mentions a research made by Gleick concerning basic water requirements for human activities, in order to support its statement regarding the minimum amount of water that should be guaranteed. However, this research also differs considerably from the minimum amount of water mentioned by the Court. In fact, the Gleick study recommends 5 lpcd for human survival, 10 lpcd for food preparation, 15 lpcd for bathing and 20 lpcd for hygiene and sanitation, which generate a total amount of 50 litres per person per day to fulfil all basic human needs.<sup>63</sup>

It can be concluded that all international standards to which the IACtHR refers demonstrate that there is a tendency to establish a minimum threshold of water to cover the most essential needs for human consumption and hygiene, at a minimum of at least 50 litres per capita per day.

Furthermore, the IACtHR states in its ruling that “[a]lso according to international standards, the quality of the water must represent a tolerable

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61 Howard, G. and Bartram, J., *op. cit.*, 2003, p. 9.

62 Ibid., pp. 9 and 22.

63 Gleick, P. H., “Basic Water requirements for Human Activities: Meeting Basic Needs”. *Water International*, 1996, 21, pp. 84-85.

level of risk”.<sup>64</sup> However, the Court does not make any other specific remark regarding water quality. It can be considered that since the Court refers to international standards, it is sending a signal to states to check those available standards regarding drinking water quality to use them at the national level. Up until today, the most complete and internationally recognised standards are the guidelines for drinking-water quality published by the World Health Organization, which also use a reference level of risk.

Continuing with the analysis of the Court’s judgment, it is also important to mention the reparation measure concerning the found violations, particularly to the right to a decent life. The IACtHR ordered to the state of Paraguay immediately, as of the date of each judgement, to provide the members of the three indigenous communities with adequate supplies of basic services and goods during the time that they remain landless. The Court requested Paraguay to deliver immediately and on a regular basis: a) sufficient drinking water for human consumption and personal hygiene of the members of the communities; b) installation of latrine or any other type of adequate sanitation systems in the settlement of the communities; c) physical and psychological attention; and d) a sufficient quantity and quality of food, among others.<sup>65</sup>

On the judgment of the *Xakmon Kasek* case, in order to ensure that the provision of basic supplies and services is adequate and regular, the Court also requested Paraguay to prepare a study that establishes, at least regarding the provision of potable water, following factors: 1) the frequency of the deliveries, 2) the method to be used to deliver the water and ensure its purity, and 3) the amount of water to be delivered per person and/or per family.<sup>66</sup>

The Court requested this study in order to guarantee that the state provides sufficient amounts of safe water to satisfy the basic needs of the members of the communities: water for drinking, cooking, and personal and household hygiene, thus fulfilling the human right to water. Moreover, with this study the Court wanted to prevent more irregularities in the observance of its decisions, since it was proven in the monitoring compliances

64 IACtHR, *Indigenous Community Xákmok Kásek v Paraguay*, Judgment of August 24, 2010, para. 195.

65 IACtHR, *Indigenous Community Yakey Axa v Paraguay*, Judgment of June 17, 2005, para 221. IACtHR, *Indigenous Community Sanhoyamaxa v Paraguay*, Judgment of March 29, 2006, para 230. IACtHR, *Indigenous Community Xákmok Kásek v Paraguay*, Judgment of August 24, 2010, para 300-301.

66 IACtHR, *Indigenous Community Xákmok Kásek... op. cit.*, para. 303.

of the other two judgements concerning the Yakye Axa and Sawhoyamaya communities that the amount provided by the state has been insufficient and inadequate.<sup>67</sup>

After examining these cases and based on the development of the Court's jurisprudence, it can be said that the Court recognises the existence of the human right to water, as a derivative right from the right to life. Therefore, for the IACtHR the right to water can emanate from Article 4 of the American Convention on Human Rights. The IACtHR notes in its judgments that access to water should be sufficient for human consumption and hygiene, and that its quality must represent a tolerable level of risk.

It is very positive that a regional court like the IACtHR rapidly adapts to the development of new human rights in order to protect the people under its jurisdiction from certain situations, such as preventing them from not having access to drinking water, which can lead to the violation of other human rights already recognised. Even though the American Convention on Human Rights does not explicitly acknowledge the human right to water, this judicial body realised that water is an essential element for the enjoyment of a number of fundamental rights, for this reason it has started to recognise the right to water through other rights already embraced in the American Convention.

It is noteworthy that the IACtHR gives a broad interpretation to the right to life, since it deems that the elements that sustain life—such as drinking water—are incorporated therein, and also because it considers that the state must guarantee minimum living conditions compatible with the dignity of the human person. Therefore, it considers that the right to water derives from the right to life. This reading contrasts with the interpretation made by some authors regarding the right to life, who consider that this is a narrow right that is related only to the security of the person or the deprivation of life, and not to the conditions that sustain human life.<sup>68</sup> Therefore, according to a restrictive interpretation of the right to life it was believed that the right to water could not derive from the former right to life.

67 IACtHR, Order of the Inter-American Court of Human Rights, *Sawhoyamaya Indigenous Community v Paraguay*. (Monitoring Compliance with judgment) February 8, 2008, para. 22.

68 Brown Weis, E., "The evolution of international water Law", in *331 Recueil Des Cours: Collected Courses of the Hague Academy of International Law*, Martinus Nijhoff Publishers, Leiden, 2009, p. 328. McCaffrey, S. C., "A human right to water: domestic and international implications", *The Georgetown International Environmental Law Review*, 1992, 5 (1), p. 9.

Furthermore, from the analysed judgements it can be clearly understood that the IACtHR takes into consideration General Comment 15 on the right to water, concerning the special attention that should be given to those population groups who have traditionally faced difficulties in exercising the human right to water, such as indigenous peoples; particularly since access to water resources on their ancestral lands should be protected, and the states should ensure that there is adequate access to water for guaranteeing the livelihoods of indigenous peoples.<sup>69</sup>

Since in the examined cases the indigenous communities do not have access to natural resources to obtain water, neither have they access to their ancestral lands, nor sufficient means to pay for it, the state is under the obligation to provide them adequate quantities of safe, free of charge drinking water. The IACtHR also considers that Paraguay, by failing to guarantee to the country the right to communal property, thus violating Article 21 of the American Convention, has produced a negative effect on the right of the members of the communities to a decent life. This due to the fact that Paraguay has deprived them of the possibility to access their traditional means of subsistence, as well as to the use and enjoyment of the natural resources necessary to obtain clean water.<sup>70</sup>

Consequently, the IACtHR ordered Paraguay to provide sufficient amounts of drinking water free of charge to the affected indigenous communities, so the state finally complies with its obligation to secure the livelihood of these peoples.

Unfortunately, the Court made a misguided interpretation of international standards concerning the minimum amount of water that should be guaranteed to any individual to realise the right to water, by indicating an inaccurate volume of water. As a matter of fact, as we said before, all international standards point out that the minimum amount of water to realise this human right should be at least (as a minimum threshold) 50 litres per capita per day. It is recommendable that the actHR corrects this mistake,

69 CESCR, General Comment 15 (2002) the right to water, UN-Doc E/C.12/2002/11, para. 7 and 16 (d).

70 The IACtHR has declared that “[t]he property rights of indigenous and tribal peoples extend to the natural resources which are present in their territories, resources traditionally used and necessary for the survival, development and continuation of the peoples’ way of life”, Inter-American Commission on Human Rights, *“Indigenous and Tribal Peoples’ Rights over their Ancestral Lands and Natural Resources”*, OEA/Ser.L/V/II. Doc 56/09, 30 December 2009, para. 182.



with the purpose of preventing that countries under its jurisdiction use the reference of 7.5 lpcd as the minimum amount that should be guaranteed to comply with the right to water, mainly because this amount will not ensure the realisation of this right to any individual.

When comparing the previous judgements with the case law of the African system, it was found that the African Commission has had the opportunity to analyse a similar case against Kenya. An indigenous community (Endorois) was displaced in Kenya from its ancestral land, without proper prior consultation or adequate effective compensation, to a semi-arid land that was not adequate to continue with their traditional way of life. Additionally, they were denied of the possibility to re-enter their ancestral land; therefore, not being able to practice their religion neither they normal subsistence activities. When analysing the alleged violations, the African Commission examined whether Article 22 (right to development) of the African Charter<sup>71</sup> was violated. The African Commission indicated that the right to development is also about providing people with the ability to choose where to live; freedom from choice must be present as a part of the right to development.<sup>72</sup> In this case, the Endorois believed that they had no choice but to leave their ancestral land, and, when some of them tried to reoccupy their former land and houses, they were received with violence and forced relocations.<sup>73</sup> In this judgment, the African Commission recalled the Yakye Axa judgement of the IACtHR and used it as an example. The African Commission noted that the IACtHR “found that the members of the Yakye Axa community live in extremely destitute conditions as a consequence of lack of land and access to natural resources, caused by [...] the precariousness of the temporary settlement where they have had to remain, waiting for a solution to their land claim”.<sup>74</sup> The African Commission also recalled that the settlement where the members of the Yakye Axa community were living did not have access to appropriate housing with the basic minimum service, such as clean water and toilets. The African Commission indicated

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71 African Charter, article 22 “All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind”.

72 African Commission, *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya*, 11-25 November 2009, Communication 276/03, para. 278

73 Ibid., para. 278-279.

74 Ibid., para. 284.



that “[t]he precariousness of the Endorois’ post-dispossession settlement has had similar effects (...) The Endorois were relegated to semi-arid land, which proved unsustainable for pastoralism, especially in view of the strict prohibition on access to the Lake area’s medicinal salt licks or traditional water sources”.<sup>75</sup>

The African Commission also received evidence that shows that access to clean drinking water was severely undermined for the Endorois community as a result of losing their ancestral land (Lake Bogoria), which has ample fresh water sources. In this case, the African Commission took into consideration the precarious condition in which the Endorois community were living, including lack of access to water, to conclude that there was a breach of the right to development (Art. 22) of the African Charter. As a result, the African Commission ordered Kenya to recognise rights of ownership to the Endorois and to return their ancestral lands. Nevertheless, the African Commission did not require Kenya to take positive actions, so as to alleviate the difficult circumstances under which this community is living, until they can return to their ancestral lands.<sup>76</sup>

In this case, the African Commission deems that access to the ancestral lands and to the use and enjoyment of the natural resources found on them, including food and access to clean water, are an important part of the right to development. Thus, it can be said that in this case, the right to access to water for indigenous peoples, which is part of the use and enjoyment of the natural resources found on their ancestral lands, derives from the right to development.

It is worth mentioning that both the IACtHR and the African Commission in the previously analysed cases attempt to guarantee access to water for indigenous peoples, who obtain this liquid from the natural resources found on their ancestral lands. Nevertheless, each judicial body takes a different approach to guarantee this right. On the one hand, the IACtHR considers access to water as an indispensable element for the right to life; on the other hand, the African Commission considers that the use and enjoyment of the natural resources found on the ancestral lands, which includes access to clean water, is a part of the right to development.

Furthermore, the African Commission has interpreted, in other cases, that the right to water is a subset of the right to health and the right

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<sup>75</sup> *Ibid.*, para. 286.

<sup>76</sup> *Ibid.*, para. 288, 289, 298.

to a healthy environment,<sup>77</sup> which correspond to Article 16 and 24 of the African Charter on Human and Peoples' Rights.

## Conclusions

It is clear that safe water is an essential element for life, since it is indispensable to satisfy daily basic human needs. Therefore, lack of access to this resource can considerably affect fundamental human rights such as the right to health, the right to adequate standard of living, and the right to a dignified life, among others.

It is for this reason that it is crucial to recognise the human right to water at both national and international level; therefore, all humans, irrespective of their colour, sex, economic position, religion, age, have access to at least a minimum of this vital natural resource.

In recent years, the IACtHR has started to recognise in its jurisprudence the essential function of access to water in relation to the realisation of some fundamental rights. It should be borne in mind that the right to water is not explicitly included in any of the treaties that form part of the Inter-American Human Right System. Nevertheless, the IACtHR is granting the protection of the right to water by considering that this right derives from other human rights explicitly provided in the American Convention. Likewise, the other two regional systems on human rights, through the decisions of the European Court on Human rights and the African Commission have also recognised the right to water as a subordinate right from other rights that have been clearly embedded in their respective regional treaties. Remarkably, the African system goes further and explicitly acknowledges access to safe drinking water in two particular regional conventions: the African Charter on the Rights and Welfare of the Child and the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa.

So far, the IACtHR has requested states to guarantee access to safe water mainly in two different situations. The first one is related to the minimum conditions given in detention or in prison, and the second refers to the case of indigenous people who have been displaced from their ancestral lands.

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77 Bulto, T. S., 'The Human Right to Water in the Corpus and jurisprudence of the African Human Rights System', *African Human Rights Law Journal*, 2011, 11, (2), p. 345.

Regarding the first situation it can be concluded that in the three regional systems on human rights (the Inter-American, the European and the African) lack of access to sufficient quantities of safe water to satisfy the basic needs of prisoners or detainees amount to a violation of human rights, since this situation is considered a cruel, inhuman or degrading treatment.

Regarding the second situation, it is clear from the previous cases that the indigenous communities were under vulnerable conditions due to the fact that Paraguay did not guarantee the right to communal property, negatively affecting the right of the communities' members to a decent life, since they have been deprived of the possibility to access their traditional means of subsistence, as well as to the use and enjoyment of the natural resources necessary to obtain clean water. As a result, due to the precarious conditions in which they were living, their right to life was at stake, reason why the state is under the obligation to provide basic services, including safe water to protect the right to a dignified life.

Based on the analysed case law it can be concluded that, for the Inter-American Human Rights System, the right to water emanates from the right to life and the right to humane treatment enshrined respectively in Article 4 and 5 of the American Convention. For the European Court on Human Rights the right to water derives from the prohibition of torture (Art. 3) of the European Convention. And remarkably, the African Commission deems that the right to water can derive from a larger number of human rights. The latter has considered that the right to water derives from the right to dignity (Art. 5), the right to health (Art. 16), the right to a healthy environment (Art. 24) and the right to development (Art. 22) of the African Charter on Human and Peoples' Rights. It is likely that these judicial bodies find more human rights from which the right to water can derive.

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